North Dakota Law Review

Volume 52 | Number 3 Article 5

1975

Constitutional Law - Equal Protection of Laws - Exclusion of Married Students from Extracurricular Activities

Charles L. Chapman

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—EXCLUSION OF MARRIED STUDENTS FROM EXTRACURRICULAR ACTIVITIES

Regulations of the Rushville Consolidated School Corporation, Rushville, Indiana,[1] and the Indiana High School Athletic Association,[2] denied married high school students the opportunity to participate in extracurricular activities, including interscholastic athletics. Plaintiff Jerry Raike married during his senior year of high school and immediately brought an action for a temporary restraining order and declaratory judgment to ensure his eligibility for high school athletics.[3] The trial court granted the temporary restraining order,[4] and, when the same court considered the merits nine months later, it held that the married student activity rules violated both the equal protection and due process guarantees of the fourteenth amendment to the Constitution of the United States[5] and entered a declaratory judgment and permanent injunction against both defendants.[6] Rushville and the Indiana High School Athletics Association appealed to the Court of Appeals for the Second District of Indiana, where a unanimous court affirmed the trial court decision and *held* that the regulations failed to satisfy the "intermediate" equal protection scrutiny[7] used by the United States Supreme Court in *Reed v. Reed*.[8] *Indiana High School Athletic Association v. Raike*, ——Ind. App.,—— 329 N.E.2d 66 (1975)

Prior to the decision in *Raike*, attacks upon similar married student activity rules had been rejected in state courts,[9] with one

---

1. Rushville Consolidated School Corporation maintained the following rule for married students:

> Married students, or those who have been married, are in school chiefly to meet academic needs and they will be disqualified from participating in extracurricular activities and Senior activities except Commencement and Baccalaureate.

Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66, 69-70 (1975).

2. Indiana High School Athletic Association, a voluntary association of Indiana high schools, maintained a rule for married students as follows: "Students who are or have been at any time married are not eligible for participating in intraschool athletic competition." *Id.* at 70.

3. Prior to his marriage, Raike had participated actively in high school athletics, including football, wrestling, and baseball.

4. Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66, 69 (1975).

5. The trial court considered the case on its merits in September, 1972, following Raike's graduation. While the issue was arguably moot at the time of the trial court decision and also at the time of the appeal to the court of appeals, the latter court deemed the issue to be "one of substantial public interest" and worthy of decision on the merits. *Id.* at 71 n.3.

6. *Id.* at 69.

7. *Id.* at 77.

8. 404 U.S. 71 (1971).

9. Board of Dir's, v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Estay v. LaFourche Parish School Bd., 230 So. 2d 443 (La. App. 1969); Cochrane v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960); State *ex rel.* Baker v. Stevenson, 27 Ohio Op. 2d 233, 189 N.E.2d 181 (1962); Kissick v. Garland Ind. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959), *overruled by* Bell v. Lone Oak Ind. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974); Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963).

exception.[10] In so holding, the state courts have reflected the generally accepted policy of deference to the wisdom and authority of school boards, with reference to matters of local school administration. The school boards in many of these cases had acted under statutory mandates[11] to provide rules necessary to ensure a proper education,[12] and the courts have thus expressed a strong reluctance to enter this province of school administration in the absence of a showing of abuse of discretion on the part of the school board.[13] As a result, the sole consideration in most of the cases has been a determination by the court as to the reasonableness of the regulation questioned;[14] there exists a presumption of validity in favor of the regulation imposed.[15] Thus, school boards have enjoyed wide powers in dealing with everyday school problems, such as discipline[16] and grooming.[17]

School boards have dealt rather harshly with married students and unwed mothers, often attempting to preclude even their attendance at school. In such instances, courts find themselves embroiled in substantial conflicts of policy, matching the broad discretionary power of the local school board against publicly favored institutions of marriage and universal education. Courts have generally drawn the line on school board discretion in this area and have rejected regulations dictating permanent[18] or temporary[19] expulsion.

---

10. Bell v. Lone Oak Ind. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974), *set aside on other grounds*, 515 S.W.2d 252 (Tex. 1974), where the court held a married student activity rule discriminatory on its face and violative of the fourteenth amendment to the U.S. Constitution.

11. *See* OHIO REV. CODE ANN. § 3313.20 (Supp. 1974); MICH. COMP. LAWS ANN. § 340.614 (1967); IOWA CODE ANN. § 279.8 (1972). *See also* N.D. CENT. CODE § 15-29-08(13) (1971).

12. For an excellent analysis of the problems in over-extension of school board authority, see Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969).

13. *See* cases cited in note 9 *supra*.

14. The question of reasonableness sometimes goes beyond the examination of school board policies. Decisions in the high school activities area, as in *Raike*, have often included state high school activities or athletic associations.

Some courts have appeared even more reluctant to enter the domain of these voluntary associations than in the case of the school boards. Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708 (1970); State *ex rel.* Missouri State High School Athletic Ass'n v. Schoenlaub, 507 S.W.2d 354 (Mo. 1974). Other courts, however, have rejected bans against interference with the business of state athletic associations and have held regulations of the associations to be state action for purposes of the fourteenth amendment. Robinson v. Illinois High School Ass'n, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1963), *cert. denied*, 379 U.S. 960 (1965); *rehearing denied*, 380 U.S. 946 (1965); Sturrup v. Mahan, ——Ind.——, 305 N.E.2d 877 (1974); Haas v. South Bend Community School Corp., 259 Ind. 515, 289 N.E.2d 495 (1972), *overruling* State *ex rel.* Indiana High School Athletic Ass'n v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E.2d 250 (1959).

15. State *ex rel.* Baker v. Stevenson, 27 Ohio Op. 2d 233, 189 N.E.2d 181 (1962); Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963).

16. *See, e.g.*, State *ex rel.* Humphrey v. Adkins, 47 Ohio Op. 2d 173, 247 N.E.2d 330 (1969).

17. *See, e.g.*, Laucher v. Simpson, 57 Ohio Op. 2d 303, 276 N.E.2d 261 (1971). *Contra*, Warren v. Board of Educ., 41 Ohio Misc. 87, 322 N.E.2d 697 (1974).

18. Nutt v. Board of Educ., 128 Kan. 507, 278 P. 1065 (1929); McLeod v. State *ex rel.* Colmer, 154 Miss. 468, 122 So. 737 (1929).

19. Carrollton-Farmers Branch Ind. School Dist. v. Knight, 418 S.W.2d 535 (Tex. Civ.

Although the courts have protected the married student to a certain extent from arbitrary school board action, the question of extracurricular activities has not been successfully addressed in state courts prior to *Raike*, possibly because no expulsion was involved,[20] and because the extracurricular activity was denied the status of a "right."[21] In the area of extracurricular activities, the student has generally found himself at the mercy of school board regulations, since he is unable to assert his right to education as a counterweight to the strong presumption favoring school board discretion.[22] In fact, state courts have permitted even wider dis-

---

App. 1967); Anderson v. Canyon Ind. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967). In Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. App. 1964), the court noted:

> The unreasonable and arbitrary effect of the regulation is thus demonstrated, since it imposes the identical result in every case, without regard to the circumstances of any case. The Board's discretion is foreclosed in advance, no matter what the facts. Such prejudgment is unreasonable and arbitrary.

Id. at 681.

Contra, State *ex rel.* Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957), where the court upheld a temporary expulsion rule for married students:

> [A]ny activity of students which can be said to have a reasonable bearing on his or her influence upon the students or school is within the bounds of reasonable regulation by the Board in the exercise of the statutory duty vested in it to suspend pupils "when the progress of efficiency of the school makes it necessary."

Id. at 33, 302 S.W.2d at 58. *See* State *ex rel.* Idle v. Chamberlain, 39 Ohio Op. 2d 262, 175 N.E.2d 539 (1961).

20. It has been suggested that school boards, having been stymied in their efforts to control teenage marriage by expulsion, have directed their quest for control to areas of school activities. *See* Knowles, *High School, Marriage and the Fourteenth Amendment*, 11 J. FAM. LAW 711 (1972).

21. *See, e.g.*, Kissick v. Garland Ind. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959); Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963).

The federal courts have generally afforded extracurricular activities a similar denial of "rights" status. *See, e.g.*, Brenden v. Independent School Dist. No. 742, 477 F.2d 1292 (8th Cir. 1973); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973).

While many of the courts in these cases have relegated extracurricular activities to "privilege" status, some state court decisions have recognized the importance of these activities as an integral ingredient in the total education of the student, so that their absence from the school program is not to be lightly regarded. Cochrane v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960) (Kelly, J.); *cf.* Granger v. Cascade County School Dist., 159 Mont. 516, 499 P.2d 780 (1972); McNair v. School Dist. No. 1, 87 Mont. 423, 288 P. 188 (1930). *Contra*, Brown v. Wells, 288 Minn. 468, 181 N.W.2d 708 (1970); State *ex rel.* Missouri State High School Athletic Ass'n v. Schoenlaub, 507 S.W.2d 354 (Mo. 1974). *But cf.* Paulson v. Minidoka County School Dist. No. 331, 93 Idaho 469, 463 P.2d 935 (1970).

Federal case law would generally appear to support the proposition that, while not a "right," extracurricular activities are to be considered as an integral part of education. *See* Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973); Moran v. School Dist. No. 7, 350 F. Supp. 1180 (D. Mont. 1972); Lee v. Macon County Bd. of Educ., 283 F. Supp. 194 (M.D. Ala. 1968); Kelly v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968).

22. It may be argued, at least in light of the federal decisions, that the right-privilege dichotomy should not be controlling in the context of equal protection. Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969). Indeed, in a decision rejecting hair length and grooming restrictions in high school athletics, a federal district court in Vermont deemed the difference between "right" and "privilege" to be inconsequential:

> If the school district through its elected officials extends this opportunity to one class of student athletes, it cannot deny it to another class without justification. A privilege may not be dispensed arbitrarily.

Dunham v. Pulsifer, 312 F. Supp. 411, 415 (D. Vt. 1970).

cretion in the area of extracurricular activities than in the area of general school administration.[23]

In the extracurricular activities cases, state court decisions have generally examined interests asserted by the school board, have found these interests to be legitimate, and have upheld the regulation.[24] A number of basic interests noted by the defendants in *Raike*,[25] appear in these decisions: (1) teen-age marriages should be discouraged;[26] (2) unmarried students should not be exposed to sexual discussions of married students;[27] (3) married students should not become school heroes or models through possible success in extracurricular activities;[28] (4) possible discipline problems from the emancipated married students should be avoided;[29] and (5) married students should be afforded adequate time to devote to the formative years of marriage.[30]

When presented with the further argument that the regulations in question serve to punish teen-age marriage, state courts have looked to the stringent statutory restrictions of teen-age marriage to find that public policy discourages youthful marriage. Thus, the courts have found that such school board regulation is merely a manifestation of a legislatively expressed policy.[31]

The federal courts appear to offer a more sympathetic forum for student claims, allowing a more subjective analysis of student problems, detached from the presumption of school board reasonableness.[32] The United State Supreme Court recognized basic con-

---

23. *See* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555 (Iowa 1972):
> In dealing with ineligibility for extracurricular activities as contrasted to expulsion from school altogether, and with students who represent the school in interscholastic activities as contrasted to less active sudents, school rules may be broader and still be reasonable.

Id. at 565.

24. *See* cases cited in note 9 *supra*.

25. ——Ind. App. at ——, 329 N.E.2d at 70.

26. The basic question presented by this often-quoted objective is the authority of the school board to function within this area of legislative concern. *See* Goldstein, *supra* note 12, at 387.

27. This objective is usually supported by the contention that teacher control is less apparent, the opportunity for "corruption" thus being more readily available, outside the classroom. It may be questioned, however, whether conversation around the water fountain and in the school cafeteria should be banned for the same reasons. Board of Dir's v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); *see* Knowles, *supra* note 20, at 729. *See also* Berwick & Oppenheimer, *Marriage, Pregnancy, and the Right to Go to School*, 50 TEXAS L. REV. 1196, 1207-11 (1972), where the authors touch upon possible freedom of expression questions in this area.

28. *See* State *ex rel.* Baker v. Stevenson, 27 Ohio Op. 2d 233, 189 N.E.2d 181 (1962), where the court noted the impact of the professional sports hero upon the American sports public and questioned whether high school students could be any less susceptible.

29. *See* Board of Dir's v. Green, 259 Iowa 1260. 147 N.W.2d 854 (1967); Cochrone v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960) (Kavanagh, J.).

30. *See* Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963).

31. *See* State *ex rel.* Baker v. Stevenson, 27 Ohio Op. 2d 233, 189 N.E.2d 181 (1962); Board of Dir's v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967). The *Raike* court failed to find such policy disfavor, instead noting that public policy permitted teen-age marriage under certain circumstances. —— Ind. App. at ——, 329 N.E.2d at 884.

32. *See generally* Shull v. Columbus Municipal Separate School Dist., 338 F. Supp. 1376 (N.D. Miss. 1972); Perry v. Grenada Municipal Separate School Dist., 300 F. Supp. 748 (N.D. Miss. 1969).

stitutional rights of students in *Tinker v. Des Moines School District*,[33] and constitutional analysis for students has been followed in lower federal courts, in areas of sex classifications,[34] race classifications,[35] grooming standards,[36] and due process deprivations.[37] By invoking equal protection concepts of "suspect classifications" and "fundamental rights," many challenging students have been able to avoid the perils of the traditional "resonableness" test and have thus been able to avoid the perils of the traditional "reasonableness" test and thus have been able to force the defending school district or activity association to show a compelling interest in justification for its action.[38]

It is not suprising, therefore, that students have pressed the concept of "new"[39] equal protection in the federal courts to overturn married student activity rules,[40] the courts holding that the regulations in question cannot withstand the requirement of a compelling state interest under strict scrutiny.[41]

One problem with the application of strict scrutiny in student rights cases is its limited area of application; *i.e.*, the student must show infringement upon a "suspect classification" or a "fundamental right."[42] While no court has conclusively recognized education as a fundamental right,[43] two federal decisions have focused on the potentially fundamental right of marriage.[44] The court in *Davis v.*

---

33. 393 U.S. 503 (1969).

34. Brenden v. Independent School Dist. No. 742, 477 F.2d 1292 (8th Cir. 1973); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973).

35. *See* Lee v. Macon County Bd. of Educ., 283 F. Supp. 194 (M.D. Ala. 1968).

36. Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).

37. Kelly v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968).

38. This "new" equal protection envisions a two-tiered system of scrutiny, under which the minimal scrutiny of "old" equal protection (presumption in favor of validity of the state action) is supplemented by a higher level of strict scrutiny (presumption against state action can be rebutted only by showing a compelling state interest in the action). *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942).

It is generally agreed that the choice of an appropriate test under the two-tiered "new" equal protection dictates the result. If the plaintiff can show a "fundamental interest" or a "suspect category," the strict test is applied and the state can rarely satisfy the compelling interest requirement. On the other hand, if the plaintiff is unable to trigger high level scrutiny, the state can easily overcome the plaintiff's challenge by showing *any* rationality for the regulation. *See, e.g.*, Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66, 73 (1975): "The importance of the standard of review adopted is that the result reached is in large part a product of that initial decision."

39. *See generally* note 38 *supra; Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. LAW QUARTERLY 645 (1975), where four distinguished law professors discuss "old," "new," and "newer" equal protection scrutiny.

40. Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972).

41. *Id.*

42. "Suspect" categorization would seem inapplicable to the married student situation. *See* Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66, 73 (1975): "Obviously, a 'suspect' classification is not involved (is not based on race, alienage or national origin)." *Id.*

43. *See generally* note 21 *supra. But see* Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972), where the court, in light of the United States Supreme Court decision in Brown v. Board of Educ., 347 U.S. 483 (1954), notes that "it is strongly arguable that the right to an education is, itself, more than a mere 'right' but a 'fundamental right.'" Holt v. Shelton, *supra*, at 823 n.3.

44. *See* note 40 *supra.*

Meek[45] found an invasion of the fundamental right to marital privacy, as guaranteed in *Griswold v. Connecticut*,[46] in a married student activity rule. It may be questioned, however, whether a doctrine that originated in the marital bedroom can logically be extended to include invasions of that privacy in the schoolhouse. The second federal decision, *Holt v. Shelton*,[47] held that a married student rule infringed upon the fundamental right to marry, allegedly recognized in *Loving v. Virginia*.[48] While the *Holt* reasoning seems more logical than notions of marital privacy in the married student cases, it has been questioned whether *Loving* ever guaranteed a fundamental right to marry.[49]

Thus, a student challenging married student activity rules may be faced with almost certain rejection under the reasonableness test of the older cases,[50] or with a very questionable basis of argument under the compelling interest requirement of high scrutiny. The apparent solution for the student would seem to be a third method of equal protection analysis, such as that endorsed by the *Raike* court.[51]

In *Raike*, the court expressly adopted an intermediate approach to equal protection[52] and determined that intermediate scrutiny was the "fair and substantial relation" concept of *Reed*.[53] By endorsing

---

45. 344 F. Supp. 298 (N.D. Ohio 1972).

46. 381 U.S. 479 (1965).

47. 341 F. Supp. 821 (M.D. Tenn. 1972), *noted in* 40 TENN. L. REV. 268 (1973).

48. 388 U.S. 1 (1967). *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

49. *See, e.g.*, Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66, 75 (1975). *But see* Van Doren, *Constitutional Rights of High School Students*, 23 DRAKE L. REV. 403, 414 (1973).

50. *But see* Van Doren, *supra* note 49; Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66 (1975), where the court concluded: "It is possible to apply the low scrutiny test to the Rules and conclude that there is no rational basis whatsoever to support such a classification." *Id.* at 77.

51. ——Ind. App. at——, 329 N.E.2d at 73.

52. *Id.* at ——, 329 N.E.2d at 78.

53. Reed v. Reed, 404 U.S. 71 (1971). *See* Eisenstadt v. Baird, 405 U.S. 438 (1972). The intermediate level of scrutiny has been characterized as a more rigorous testing of equal protection cases without invoking the limited concept of strict scrutiny. Thus, the court is able to avoid value judgments on the legitimacy of legislative purpose and can assess the "rationality of means" utilized by the state to meet the expressed objectives of the state. Gunther, *The Supreme Court 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Comment, *"Newer" Equal Protection: The Impact of the Means—Focused Model*, 23 BUFFALO L. REV. 665 (1974).

The *Raike* court equated the "substantial relation" concept of *Reed* with the "sliding scale" approach advocated by Justice Marshall of the United States Supreme Court and with the "means" model introduced by Professor Gunther. While all three approaches operate between the extreme tiers of the "new" equal protection, it is arguable that at least a conceptual difference exists among the theories. While the *Reed* and Gunther models break away from the mold of two-tiered equal protection, the "sliding scale" determination of Justice Marshall offers a more realistic application of an equal protection test which recognizes important rights and interests.

> As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 102-103 (1973) (Marshall, J., dissenting).

this "newer" equal protection,[54] the Indiana court recognized its ability to reject married student regulations even if such regulations were found to have some rational relation to a legitimate state purpose,[55] a finding which would have foreclosed equal protection challenge under the traditional approach.[56] The regulations of Rushville and the Indiana High School Athletic Association, the court concluded, were both under-[57] and over-inclusive,[58] thus falling within the mandate of *Reed*:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[59]

While *Raike* is perhaps the most explicit adoption of this "newer" equal protection in the extracurricular activity area, earlier decisions appear to have applied a similar approach. Perhaps the strongest adoption of intermediate scrutiny appears on *Moran v. School District No. 7, Yellowstone County*,[60] where the court recognized the importance of extracurricular activities as an "integral part of the total education process,"[61] and gave even greater weight to the rights of marriage,[62] requiring a showing of "substantial evidence" of the legitimate concern of the school board.[63] Two other federal decisions[64] and one state decision[65] also appear to fall within the general area of something-more-than-minimal scrutiny, but all three cases also hint at applications of the two-tiered approach, thus offering questionable precedent in the "intermediate" scrutiny field.[66]

---

54. *See* Gunther, *supra* note 53.

55. ——Ind. App. at——, 329 N.E.2d at 78. *See* Reed v. Reed, 404 U.S. 71 (1971), where the court rejected a probate classificaion although it was "not without some legitimacy."

56. *See, e.g.*, Indiana High School Athletic Ass'n v. Raike, ——Ind. App.——, 329 N.E.2d 66, 72 (1975).

57. The court found that the regulations excluding married students from extracurricular activities failed to place a similar burden on other students who were just as likely to exhibit the corrupting influence which the regulations sought to eliminate. *Id.* at ——, 329 N.E.2d at 77.

58. The court also found that the regulations included some married students of "good moral character" who would not corrupt school morality, thus extending rule coverage beyond the necessary limits. *Id.*

59. Reed v. Reed, 404 U.S. 71, 76 (1971), *citing* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

60. 350 F. Supp. 1180 (D. Mont. 1972).

61. *Id.* at 1184.

62. *Id.* at 1186. The court also expressed concern over the validity of any school board action in the area of marriage, endorsing the views of Goldstein, *supra* note 12.

63. Moran v. School Dist. No. 7, 350 F. Supp. 1180 (D. Mont. 1972).

64. *See* Hollon v. Mathis Ind. School Dist., 358 F. Supp. 1269 (S.D. Tex. 1973), *vacated on other grounds*, 491 F.2d 92 (5th Cir. 1974); Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972), *analyzed in* Berwick and Oppenheimer, *supra* note 27.

65. *See* Bell v. Lone Oak Ind. School Dist., 507 S.W.2d 635 (Tex. Civ. App. 1974), *set aside on other grounds*, 515 S.W.2d 252 (Tex. 1974).

66. Bell v. Lone Oak Ind. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974) (Ray,

The problems with married student activity rules offer good examples of the faulty nature of the two-tiered approach to equal protection scrutiny. As noted above, two rights are involved in the married student analysis: the right to carry and, at least arguably, the right to a full education, both rights being uniformly recognized as important and "nearly" fundamental. Under the older equal protection and also under the more modern two-tiered approach, these important interests of marriage and education are not adequately protected, since the two "nearly" fundamental rights, even when juxtaposed in the married student situation, cannot add to a full fundamental interest worthy of strict scrutiny protection. Under intermediate equal protection scrutiny, as espoused in *Raike*, or as perceived by other intermediate equal protection concepts the "means" approach of Professor Gunther[67] or the "sliding scale" concept of Justice Marshall,[68] appropriate consideration could be given to the total effect of the interests which are being infringed,[69] unhindered by an unrealistically rigid system of equal protection testing.

CHARLES L. CHAPMAN

J., and Cornelius, J., concurring, both spoke in terms of fundamental rights, but seemed more concerned with application of an equal protection test somewhere beyond minimal scrutiny); Hollon v. Mathis Ind. School Dist., 358 F. Supp. 1269 (S.D. Tex. 1973), *vacated on other grounds*, 491 F.2d 92 (5th Cir. 1974) (concern shown for protection of possible scholarship and marriage rights but decision also talked of the 'rationality' of minimal scrutiny); Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1972) (emphasis on marriage infringement and the means of classification, although court did speak in terms of simple 'rationality').

67. Gunther, *supra* note 53.

68. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting).

69. *See generally* note 53 *supra*.